Supreme Court, U. S.
FILED
APR 4 1979
MICHAEL RODAK, JR., CLERK

in the

Supreme Court
of the
United States

CASE NO: 78-1574

JOSE LUIS LINARES and
JOSE ANTONIO FERNANDEZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE 5th CIRCUIT COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE 5th CIRCUIT COURT OF APPEALS

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the 5th Circuit Court of Appeals entered in the above styled case on January 26, 1979, re-hearing denied March 2, 1979.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at _____ F.2d _____and is printed in the Appendix.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on January 26, 1979. Hearing was denied on March 2, 1979. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to grant Petitioners' Motions for Directed Verdicts of Acquittal at the close of the case in the absence of sufficient evidence of conspiracy?

2. Whether the trial court erred in failing to grant Petitioners' Motions for Directed Verdict of Acquittal at the close of the case in the absence of sufficient evidence of possession with intent to distribute marijuana?

3. Whether the trial court erred in admitting into evidence a tackle box found on "The Last One" where the chain of custody was defective and there was evidence of deliberate tampering with the property found on "The Last One"?

4. Whether the trial court erred in denying defendant's Motion for the Divulgence of a Confidential Informant where no claim of privilege had been made by the United States or any representation that disclosure of the confidential informant would endanger the government's interest?

5. Whether the trial court erred in making prejudicial comments in its limiting instruction which effectively denied Petitioners a fair trial?

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE AND FACTS

On April 12, 1977, an indictment was filed, charging the Petitioners, LINARES and FERNANDEZ, with conspiracy in violation of Title 21 of the USC, Section 841, all of Title 18 USC Section 2 and violation of Title 21 USC Section 846, as set forth in counts one and two of the indictment. The Petitioners at arraignment plead not guilty and requested ten (10) days for the purpose of filing motions. Thereafter, Petitioners, LINARES and FERNANDEZ, joined in a Motion for Severance, prejudicial joinder and Motion for Limiting Instructions. These motions were not promulgated by these Appellants but were joined in on the motions made by other counsel, there having been an agreement that all motions made in this cause were joined in by all other counsel as if made by these particular Petitioners and that the ruling of the court affected all Petitioners in this cause. All motions applied to all Petitioners in this cause. On September 1, 1977, a jury trial of all Petitioners was held before the Honorable Judge Sidney Aronovitz, of the United States District Court for the Southern District of Florida.

On September 15, Petitioners, LINARES and FERNANDEZ, were found guilty as to counts one and two. On October 21, 1977, the Appellants were adjudged guilty and sentenced to two (2) years in jail on each count, said jail time to run concurrent with each other and Petitioners to serve a special parole term of two (2) years following the period of confinement.

Petitioners' convictions and sentence were affirmed by the Fifth Circuit Court of Appeals on January 26, 1979, rehearing denied March 2, 1979. This Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

The Government presented some preliminary witnesses to establish the identity of certain materials intended to be introduced into evidence at a later time for the purpose of identifying same for introduction into evidence, to wit: testimony of Roland Tebeau in the preliminary discussion with the Court. There was argument made as to the limiting instruction to be given by the Court regarding the exception to the hearsay rule of the Court relative to instructions to the exception to the hearsay rule regarding the alleged co-conspirators was joined by all parties requesting a modification of the Court's instructions, the Court stating it would give its own instruction. (TR 33)

Prior to the Government commencing, it is stated that there was a witness produced by the Government, to wit: Gil Payett, who testified as to his boarding of a boat, to wit: The Andrea. What, however, is significant was his admission that there were other boats in that area on the night in question, to wit: February 13, 1977, when he did observe other boats "In Southbay that night". (TR 42) The next witness called by the government was Kevin Foley, whose testimony basically identified certain exhibits which had been identified by Agent Foley. Factually, on cross-examination, Agent Foley was questioned as to Exhibit one, by writing counsel and he testified that the alleged contraband which wrapped exhibit one was made of burlap and that the burlap did in fact shed. (The significance of this will be discussed at a later time.) (TR 96)

The following witness was George Donahue, employed by the United States Customs Patrol Division,

who identified exhibit Number 18, which was placed in his possession by Officer Gil Payett, until he turned the property over to Agent Foley. (TR 103) The next witness called in the Government's case was Gloria Maria Orgaz, (TR 105), a photographer, to which we take no exception. After introducing and marking various exhibits, the government then called its first major witness, Mr. Berckmans. (TR 119) After testifying to his credentials, Mr. Berckmans testified that he had various conversations with Mr. Mario Abascal, Mr. Frank Medina, and Mr. Pedro Navarro, and that they had first met these people at the Sambo's Restaurant in Coral Gables at or about the tenth day of January, 1977. (TR 121) During the course of Mr. Berckmans' testimony, a request was made for a "limiting" instruction relative to the exception to the hearsay rule, and the court read the following instructions:

> "Now, here is the Preliminary Instruction:
>
> When it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a Defendant was one of the members, then the statement thereafter knowingly made and the act or acts knowingly done by any persons likewise found to be a member may be considered by the jury as evidence in this case as to the other defendants found to have been a member . . . I repeat, the Government will have to show to the Court and to the Jury that there has been independent evidence, not of a hearsay nature, evidence sufficient to establish the particular defendant's connection with the conspiracy, *and a determination* will be made by the Court." (TR 123-125)

Motions for mistrial were made and joined in by all defendants which motion was denied. (TR 127) Mr. Berckmans presented some cards he had received from Mr. Navarro containing the name of Mr. Abascal together with his phone number. He further testified that "They" desired to bring in some material and that they needed to put a member of the organization at the beach area controlled for security by Wackenhut, and that Abascal was to be placed as a Guard at the Turkey Point area in which the parties were interested. (TR 132 & 133) There was further testimony that Mr. Berckmans received Five Thousand ($5,000.00) Dollars in cash in the men's room, which Five Thousand ($5,000.00) Dollars allegedly was delivered by Mr. Navarro. Subsequently, on January 11, 1977, the witness met with Abascal wherein he allegedly was informed that Mr. Abascal would be the guard at Turkey Point in order to effectuate the "plan". The testimony reveals that Mr. Abascal never acted as a guard but that however, Special Agent Foley of the DEA became the guard. (TR 151) Thereafter, the witness, together with Abascal and Foley, met at the Westward Ho Restaurant where again, allegedly, Abascal gave Foley Two Thousand ($2,000.00) Dollars for his part in the alleged scheme. (TR 151 & 152) At or about that particular time, Abascal was alleged to have taken Foley and the witness to the Turkey Point area where the material was to have been dropped. (TR 155) The witness assured Abascal that Foley would be on post at the Turkey Point area and was further advised by Abascal that the operation would "Go either the following Sunday or Saturday, that they should be ready". (TR 157 & 158)

Thereafter, the witness made a statement in response to a question that the organization which Mr.

Berckmans said Mr. Abascal spoke to him about at the January sixth meeting was "A large organization having headquarters in Atlanta and that he, Abascal, was in charge of site selection." At which time a Motion for Mistrial was made by Mr. Max Kogen which was denied by the court. (TR 159) We specifically mentioned that, as a matter of fact, it will be agreed between counsel and the court that the Motions of one attorney was adopted for all defendants without the necessity of each attorney arguing and cluttering the record. (TR 140)

Another motion thereafter was made for severance which was joined in by the writer specifically. (TR 172) There were various arguments outside the presence of the jury relative to the Government having indicated that a second confidential informant was involved in this cause (TR 172), whose name had not been given to the attorneys after the government indicated that they had no intention of calling him and the court did indicate that its recollection was that the government had only specified one confidential informant. (TR 175) The government admitting that its unknown informant only met Navarro and Medina and "Never had contact with anyone in the trial here today." (TR 176) The relevancy of this we believe, will be made apparent at a later time. On cross-examination, Mr. Berckmans testified that he had not met any of the Appellants other than Abascal, Navarro and Medina, who was not a Petitioner in this cause. (TR 180) Also an examination of the testimony of the witness will reveal also that during the course of Mr. Berckmans' cross-examination no names of any other Appellants were raised or discussed by either Mr. Abascal, Berckmans, Medina, or Navarro.

The testimony further revealed that the only merchandise that Abascal, Medina or Navarro intended to bring in were "lobsters, frozen lobster tails, and coffee." (TR 182) In fact, at no time was there any indication that "drugs" were to be brought into the country. (TR 182) There was further testimony by the witness referred to herein that any discussion related to a water vehicle referred to was the singular rather than the plural, and that the witness was uncertain as to whether Abascal referred to a boat or boats. In fact, the witness was shown a report by Agent Foley in which the word boat was used as information given by the witness. (TR 226) On re-direct examination, the Government, in an attempt to rehabilitate its witness, asked the witness whether the conversation had involved drugs and the witness admitted that it wasn't drugs.

The next witness called by the Government was Kevin Foley, again, who gave his qualifications and who stated that he had conversations with Pedro Navarro: that certain meetings had taken place with the Defendant Abascal and that the only mention of a water vehicle was in the singular, to wit: a boat. (TR 235) That Foley was paid Three Thousand ($3,000.00) Dollars by Abascal and that again, a Motion to Strike and severance was requested by counsel, and that the court denied said motions. (TR 247 & 248) The further testimony on direct examination of Defendant Foley indicated that all of his dealings were with Abascal or Berckmans other than some meeting with Navarro and Medina and that he had in fact received another One Thousand ($1,000.00) Dollars. (TR 285) Mr. Foley further testified that on the 13th day of February, 1977, he met Abascal at Turkey Point (TR 301) and was requested to unlock the gate so that certain trucks were to

come into the area in which the witness was located (TR 304) and that in fact a large white Ford Van did drive into the complex. The witness then went to make his rounds and the witness then saw a blue truck, a camper truck, and was able to identify Felix Valdez, as being the driver of a vehicle. He then stated he saw the *motor* vehicle leaving the area at Turkey Point and followed them in his vehicle. (TR 325) The witness also testified that nothing in the nature of contraband was found on the boat, The Last One. (TR 329, 367) There was additional testimony by DEA Agent Foley which at no time involved Petitioners herein and did not in any way relate the Petitioner LINARES or FERNANDEZ to any conversation relative to the importation of contraband, or that in fact their names were ever raised or made a part of any discussions, or that DEA Agent Foley had any knowledge of the existence of the two Petitioners until they were arrested on the boat, "The Last One".

It is noteworthy to indicate that various objections were made in which the Petitioners, LINARES and FERNANDEZ, contended that there had been no showing of any conspiracy to that point, knowledge of conspiracy, nor were they under suspicion for committing or engaging in a conspiracy.

Further examination of the witness revealed that on the 13 day of February, 1977, there were approximately 15 to 20 people on surveillance (TR 365) and that at no time did any of these other witnesses, or the surveillance witnesses, or this witness see any marijuana taken off any boat. (TR 367) He further testified (still referring to FOLEY) that to his knowledge and belief no contraband of any kind was ever found on the vessel, "The Last One", which vessel admittedly by all parties was occupied by Lorenzo Aday Lorenzo, JOSE LUIS LINARES and JOSE A. FERNANDEZ. (TR 392-395) The witness further admitted that upon information and belief that there was found on the "The Last One" a tackle box, some beer and other minor personal property. At this point, Agent Foley was discharged as a witness and Fernandez was the next Government's witness.

His preliminary questioning really has no significance in this writer's opinion to the issues raised in this Petition. However, he did state that sometime between 7:30 AM and 9 PM, he heard noises which he indicated were made by two boats. Mr. Fernandez testified as to the directions which the boats were going and that the sound, after this passing, ultimately diminished. The only identification made of any boats by the witness Avelino Fernandez was that he saw only silhouettes. (TR 428)

The witness further testified that the boats, within a short period of time, returned from where they had gone and then went into open water. Ultimately, there came a time when the sound of the engines were not audible. (TR 430) The rest of his direct testimony is, in this writer's opinion, not really relevant other than the fact that the witness tracked the small boat and indicated the direction in which the boat went. While the conversation and the questioning appear to be rather confusing, it appears that Mr. Fernandez testified that the "boat we presume meaning the small boat." "The Last One" came back into the area where the big boat was and started to tow the big boat back. (TR 436) As a result of an alleged defect of the big boat's engine, it could not start. On cross examination, the witness

testified that he conducted his surveillance from a tree and admitted:

A. That he did not see or read the names or the markings of the boat. (TR 438-439)

B. Neither did he observe any contraband on any of the boats. (TR 439)

He further admitted on cross examination that he never saw either of the two boats in question unload any contraband or any other substances anywhere in the Turkey Point area. (TR 439) He further testified on cross examination that he lost sight of the boat, "The Last One" for a period of time, and additionally, the witness admitted under cross examination that he could not really tell if the sounds he heard were from an engine, two engines, or anything thereof. (TR 433) It was further obvious that about the best that Mr. Fernandez (TR 444) could testify to was that he saw silhouettes of boats and it must, therefore, be inferred that he could not identify any boats directly. (TR 444)

And, he further admitted that he did not see anything unusual about the second boat (the second boat being "The Last One"), other than the antenna.

Mr. Fernandez stated that one of the boats appeared to have trouble getting started and that he heard a siren, like a bell ringing. (TR 446) He could not answer whether or not in fact there was a distress signal in the Navy or Coast Guard parlance or that it was clearly audible to him. We direct this Honorable Court's attention to (TR 450) wherein a Motion was made to strike the testimony of Mr. Fernandez, which was denied.

What is significant, however, is that the Court was aware of the necessity that a connection regarding the exception to the hearsay rule be established, did bear in mind an allowance for the renewal of the Motion. (TR 450)

The next witness in this cause was one Michael Landa, whose testimony is really not significant for the purpose of this appeal other than the fact that he had lent the boat known as "The Last One" to Lorenzo Aday Lorenzo for sport fishing (TR 453) and further testified as to the known good character of Mr. Lorenzo Aday Lorenzo.

The next witness called was one John T. McKutcheon, Special Agent for the DEA, who testified that he was working aboard a DEA vessel off Turkey Point on February 13, 1977. He stated that he commenced the surveillance approximately 6 to 6:30 PM and that the only boat that he saw *at that time* was one little skiff. (TR 459) He, however, does admit that he doesn't recall seeing any boats other than the two boats which entered into the bay following each other which is in and around the Turkey Point area, to wit; Angel Fish Creek. He did admit that the two boats he saw were, in fact, fishing type vessels (TR 461) and stated that the boats did run with their lights on from time to time. (TR 461) The boats then reappeared approximately an hour later, at which time the witness, and the boat he was on, were approximately three quarters of a mile from the two boats in question and "One of them appeared to be towing the other one . . . We could only hear one engine." (TR 462)

Mr. McKutcheon stated that subsequently he went aboard the larger boat (which is not the boat on which the Petitioners were on) and that three individuals were arrested. Mr. McKutcheon identified the three people on the boat, none of them being either LINARES or FERNANDEZ. On cross examination, a question arose as to the time the witness arrived at the Turkey Point area, the witness finally admitting that he was not sure of the time but that he had arrived at the area just prior to dark. (TR 467) Significantly, the witness admitted that it was good maritime procedure to render assistance to a boat in distress. (TR 473)

The next witness was one Gil Payett, agent for the U.S. Custom Patrol, who testified as to having been involved in the seizure of the boat, "The Andrea", that he did see various lobster traps on the boat, that the surface was slick and that he did find a residue in the bottom portion of the vessel which was tested for marijuana and found to be positive. (TR 427)

The following witness was one Robert J. O'Leary, Special Agent, DEA, who testified that he was on Biscayne Bay, just south of Pumpkin Key, an area adjacent to the area in which the occurrence previously related allegedly took place. The witness admitted that he observed several boats in that area *including a cabin cruiser*. (TR 510) The witness testified as to the movement of two boats and then indicated that at or approximately 10:50 to 11 PM the smaller of the two vessels exited the canal, turned back into the canal, and then ten minutes later exited the canal towing a larger commercial vessel. (TR 512) The witness testified that he then boarded the smaller of the two vessels called "The Last One" and arrested three individuals on board. We

further direct this Court's attention to the fact that while there appears to be some identification, the parties whom the witness identified are not identified for the record.

The witness further testified that he discovered on "The Last One" a small tackle box having tools, hooks, *lines* and leaders, and a cooler of beer with some ice. (TR 514) The witness admitted that when the boat came out of the canal the second time, it had its lights on. We now specifically direct the Court's attention to the testimony of the same witness at page 514 wherein the witness stated that a small tackle box was found to be on the boat which had "reels and a few hooks and *line* and leaders." On cross examination, the witness admitted he had made a thorough search of the boat and found nothing remarkable as far as contraband was concerned, found no residue of any narcotic substance, found nothing which would indicate any strings that might have come off a burlap bag. (TR 516 and 517) The witness admitted that he knew what line fishing was and explained to the jury as being "fishing without using poles, using bait and hooks and lines." After having admitted on two occasions that he found lines in the tackle box (TR 517, 518), the witness stated; "I don't think I found lines." He then reversed his testimony, saying; "I remember hooks, some leader." (TR 518) The witness further admitted that the lack of bait was not unusual and that, in fact, he had friends who bought bait at the point of their fishing destination. (TR 518, 519)

The next witness called by the Government was Roland Tebeau who testified to nothing which related to the Petitioners herein and, in fact, only related to land surveillance and a blue and white camper, identifying

the driver of the camper who was neither of the Petitioners. He did state that he never saw any bales which were found in the truck.

The next witness was Nick Zapata, whose testimony holds no significance in relation to Petitioners herein.

The writer at this point will skip the testimony of various agents who testified as to that which had taken place in the Turkey Point area and had made certain arrests and confiscated certain automobiles.

The next witness relevant to the Petitioners' part of this case was Fred Hodder who testified that he was an employee of the United States Custom Service and had at one time gone aboard the vessel "The Last One" when it was tied up behind the District Office. Mr. Hodder indicated that he had removed from "The Last One" certain water skis, tools, tackle box and radio equipment (TR 634) and the tackle box was moved in to evidence over objection. The basis for the objection was that a proper predicate and chain of custody had not been established to bring it to the admission stage. There had been a period of time when Mr. Hodder did not have possession, dominion or control over the box; the contents of which were on the boat "The Last One" at the time it was seized. (TR 636-639)

Further on cross examination, Mr. Hodder indicated he was not aware of any inventory by Special Agent O'Leary, and was unaware of what had been in the tackle box at the time Agent O'Leary looked in the tackle box. He admitted that he did not know when the boat had been seized or how long the boat was unattended. (TR 642) Mr. Hodder further admitted that he did not find the two six packs of beer which Agent O'Leary testified was on the boat at the time he had it. (TR 634) The witness admitted also that he was only responsible for items that he removed from the boat at the time the boat was turned over to him and would have no knowledge of what had been removed previously. (TR 646) A Motion was made again to preclude the admission of the tackle box, and to strike testimony which was denied. (TR 649-654) A Motion for Mistrial was then made, which was also denied.

The Government then rested its case.

Counsel moved for a directed verdict of acquittal at the end of the evidence. Motions as to LINARES and FERNANDEZ, Petitioners herein, were denied. All other motions made during the course of the trial were renewed, and denied. The Court did not change any of its rulings. A charge conference was then held. Mr. Allen, chemist for the DEA, testified in part that the marijuana found on the larger boat, "The Andrea" (not the boat on which FERNANDEZ and LINARES were on) contained 1.75 grams of marijuana. (TR 686)

The Government then rested its case. Counsel moved for a directed verdict of acquittal at the end of the Government's case, all of which were denied. (TR 785-789) All other motions made during the course of the trial were renewed and denied. The Defendants, individually, then announced that they would exercise their constitutional rights and not testify. The Petitioners rested together with the other defendants. Trial counsel's renewal of motions for directed verdict were then made, which the Court denied. (TR 815)

A request for jury instruction was made by the Defendant Aday, which was denied. After due deliberation, the jury found each defendant guilty of conspiracy and possession with intent to distribute.

REASONS FOR GRANTING WRIT

I

THE TRIAL COURT ERRED IN FAILING TO GRANT PETITIONERS' MOTION FOR DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE CASE IN THE ABSENCE OF SUFFICIENT EVIDENCE OF CONSPIRACY.

The fundamental question as to Issue I is whether the Government proved a conspiracy involving LINARES and FERNANDEZ "beyond and to the exclusion of every reasonable doubt", as required. *Holland v. U.S.*, 348 US 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); *U.S. v. Palacios*, 556 F.2d 1349 (1977).

The writer has purposely devoted a great deal of time to pointing out the facts to this Honorable Court. Of course, as counsel sees it, it must only give rise to the fundamental facts that only three people ever had any conversations at all which might, in its most remote possibility, constitute some conspiracy. That is, the alleged conversations between Mr. Berckmans, a witness for the Government, a DEA agent, who allegedly received some money, to wit: Special Agent Foley, and the parties, Francisco Medina, Mario Abascal and Pedro Navarro. However, the record shows that the only statements made by the above three were to "bring in" lobster tails and coffee. Throughout the rather extensive examination by the Government's attorney, and cross examination by all defense counsel, there never came a time when any of the parties having discussions with Mr. Berckmans or Agent Foley mention the names

LINARES or FERNANDEZ, nor, in fact, was any one else's name brought into play as having any knowledge of any alleged conspiracy or attempt to commit a crime dealing with narcotics. In addition, a perusal of the record will not reveal the slightest scintilla of proof that the Petitioners even knew any of the other parties, defendants or otherwise, other than Lorenzo Aday Lorenzo. According to *U.S. v. Salinas-Salinas,* 555 F.2d 470 (1977):

> "The essential elements of a criminal conspiracy are an agreement among the conspirators to commit an offense against the United States and an overt act by one of them in furtherance of the agreement."

U.S. v. Isaacs, 516 F.2d 409 (5 Cir. 1975) cert. den. 423 U.S. 936, 96 S.Ct. 295, 46 L.Ed.2d 269, states:

> "The government must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and with that knowledge intentionally did something to further or carry on that conspiracy."

See also, *Causey v. U.S.,* 352 F.2d 203 (5 Cir. 1965).

The closest the Government comes, allowing that the evidence must be viewed in the light most favorable to the Government as per *Glasser v. U.S.,* 60 S.Ct. 457, 86 L.Ed 68 (1942) and *U.S. v. Peterson,* 488 F.2d 649; is the fact that FERNANDEZ and LINARES were on a boat called "The Last One" at or about the Turkey Point area when allegedly the marijuana was found in some trucks on shore. We must emphasize to this Court

that the Petitioners were not on a truck nor was there any evidence that they were near a truck or trucks, that they knew of anything relative to any material, contraband, or otherwise, which may have been in the truck and that the only relationship that the Government was able to establish was that Petitioners were at the Turkey Point area on the night in question. See *U.S. v. Duckett,* 550 F.2d 1027 (1977):

> "Mere presence is insufficient to sustain a conviction of conspiracy."

See *U.S. v. Salinas-Salinas,* supra:

> "Mere presence at the scene of a crime is insufficient to establish participation."

Without citing any additional pages in the transcript of testimony, which would constitute a redundancy, and for the purpose of brevity, we direct this Honorable Court's attention to the fact that "The Last One" on which the Petitioners were situated, was ultimately confiscated and a thorough search was made of the vessel. It is rather remarkable to imagine that the Petitioners herein, who were supposed to be involved in a conspiracy and who were supposed to have aided and assisted in a conspiracy, and who, in no form, manner or means, were involved in the delivery or unloading of any contraband, were by the Government's own words, "found free of any culpability in respect to what was found on the boat 'The Last One'". The record is replete with testimony that:

> A. "The Last One" had no marijuana on it or even the slightest degree of residue of marijuana.

B. That there was no conversation by any of the Government's witnesses that they loaded or unloaded any contraband.

C. That any substance of burlap hairs or fibers were found on the boat, "The Last One".

We specifically direct attention to the fact that it was clearly admitted that burlap sheds and had there been any marijuana in burlap bails, some shedding would have been found which could have at least connected, as remote as it may have been, the Petitioners with an alleged finding of marijuana in a few trucks.

What then connects the Petitioners herein to this alleged conspiracy?

Nothing other than the fact that they traversed a series of canals, came out of a canal, proceeded on their way and then heard a distress signal from a bigger boat, to wit: "The Andrea." They then turned around and went back to the large boat, "The Andrea", and started to tow her, it being clear that "The Andrea" was dead in the water. The Government assumes the position that the acts of a "good samaritan" are to be construed, and should be construed, as a form of conspiracy. We, of course, take violent objection to same and cite to the Court the following:

In the case of *U.S. v. Duckett,* 550 F.2d 1027 (5 Cir. 1977), it was promulgated as a principle of law that "mere presence is insufficient to sustain a conviction for conspiracy." This case, in brief summation, dealt with a situation where the defendant was in the *company* of persons caught attempting to smuggle in a suitcase of

heroin from the Bahamas. It appeared that the defendant had a pre-existing relationship with the conspirators and that each of the defendants gave the inspector an alias. The Court in that case reversed, and in its decision, stated:

> "In the conspiracy context, the proof may be circumstantial or direct or both, but must convince beyond a *reasonable doubt* and say that a conspiracy existed. That the defendant knew it, and with knowledge intentionally did some act or thing to further carry on the conspiracy."

Where factually does this exist in this case? Particularly, and I apologize for the redundancy, when the Petitioners herein were not even close to any contraband. There was no showing of any contraband, no showing of any knowledge that contraband was being imported, or even in the furthest stretch of the imagination, that Petitioners knew any of the parties joined as co-conspirators in this case.

Again, we challenge the Government to establish with this Honorable Court that the parties knew each other, that they were associated with each other, or that they even knew of the existence of each other; which is, of course, substantially less than the conditions in *U.S. v. Duckett,* supra, where the defendant at least was in the presence of those importing contraband.

It is, of course, general and fundamental law that proof to establish a conspiracy must convince beyond a reasonable doubt that a conspiracy existed, that the defendant (or defendants) knew of it, and with that knowledge intentionally did some act or thing to further carry out the conspiracy.

U.S. v. Salinas-Salinas, supra, in addition to the aforementioned case; we respectfully cite to this Court the case of *U.S. v. Bright,* 550 F.2d 240 (5 Cir. 1977) which, again, contains greater factual conditions or evidence upon which to presume a conspiracy, and the Court decided that a conspiracy could not be proved under the facts presented in that case.

The charge in that case was conspiracy to import marijuana. The defendant, an airplane broker, was to be given Ten Thousand ($10,000.00) Dollars for modification of a particular airplane which others intended to use to import marijuana. The defendant was also heard to refer to one of the individuals involved in the import scheme as having "made another connection."

I use this case and the others as an indication that I am not taking the weakest of the cases, but those which may have some greater factual situations which are not present in the case at bar. Even under the factual situations as heretofore given in the case of *U.S. v. Bright,* supra, the Court stated that despite the fact that the defendant had made the statement "Bob has made another connection", the defendant was to receive Ten Thousand Dollars, the Court nevertheless stated:

> "all the acts of the defendant which were brought out at trial, therefore, can be given an innocent interpretation. While it is true that acts in themselves not unlawful will lose that character when they become constituent elements of a criminal conspiracy, *this will not be the case unless the government first proves that the accused had knowledge of the criminal conspiracy."*

I am certain that this Court will find matters in this brief which have heretofore been discussed. We nevertheless feel it incumbent upon us to direct the Court's attention to previous rulings, and cite to the Court in suport of our position *U.S. v. Falcone,* 311 U.S. 205 at page 207, in which the most significant portion of the decision, at least in the writer's opinion, is "those having no knowledge of the conspiracy are not conspirators." *U.S. v. Hirsch,* 100 U.S. 33, 34, 25 L.Ed. 539; *Weninger v. U.S.,* 47 F.2d 692, 693.

In addition, without belaboring the Court and defending the point with additional arguments, we respectfully cite to the Court for its information, consideration and edification, *U.S. v. Waddy and Gonzalez,* 536 F.2d 632 (5 Cir. 1976); and *Causey v. U.S.,* 352 F.2d 203 (5 Cir. 1976), in which the Court promulgated the following rules on a case not actually on point, but nevertheless represents the law as counsel understands it, to wit:

> *"To establish the intent essential to a conviction for conspiracy, the evidence of knowledge must be clear and not equivocal.* A suspicion, however strong, is not proof and will not serve in lieu of proof. Charges of conspiracy are not to be made out by piling inference upon inference. Guilt of conspiracy may not be inferred from mere association."

The Government in this case failed to even establish conspiracy by association, knowledge of the parties, or anything else, other than the fact that the boat "The Last One" was in or about the area where a crime was alleged to have been committed.

"It is true that the proof may be circumstantial, or direct, or both, but must convince beyond a reasonable doubt that a conspiracy existed, that the defendant knew it and with that knowledge intentionally did some act or thing to further or carry out that conspiracy." *U.S. v. Causey*, supra, at 207.

Probably the most significant current case is the case decided in the matter of *Causey v. U.S.*, supra, in which the Court promulgated and continued to adopt the following principles of law:

A. Charges of conspiracy are not to be made out by piling inference upon inference.

B. Guilt of conspiracy may not be inferred from mere association.

C. While proof of conspiracy may be circumstantial or direct or both, it must convince beyond a reasonable doubt that a conspiracy existed, that the defendant knew of it, and that with that knowledge he intentionally did some act or thing to further or carry out that conspiracy.

D. Evidence merely proving that by association with known guilty parties defendant had an opportunity to become a part of conspiracy to commit the substantive offenses was insufficient to establish defendant's guilt on conspiracy counts.

In the more recent case of *U.S. v. Salinas-Salinas*, supra:

"The essential elements of a criminal conspiracy are an agreement among the conspirators to commit an offense against the United States and overt act by one of them in furtherance of the agreement, *U.S. v. Isaacs*, 516 F.2d 409 (5 Cir. 1975) cert. den. 423 US 936, 96 S.Ct. 295, 46 L.Ed.2d 269. The government must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of it, and with that knowledge intentionally did something to further or carry on that conspiracy." *Causey v. U.S.*, supra.

We direct the Court's attention, of course, to the factual situation in *Salinas* which is more extenuating than that which was before the Hon. Sidney Aronovitz, U.S. District Judge, and considers closer circumstances to conspiracy in the *Salinas* case than that which is shown in all respects in the instant case.

The facts, very simply, for the Court's edification are as follows. Agents followed a truck (suspected of containing contraband) to Orange Grove, where a number of people scattered, found clothing presumably discarded by wearers to enter truck storage area. Defendant answered the door of a nearby house, wearing only underwear. Defendant was in an "excited" state, though he said he had been sleeping. Defendant indicated "marijuana" in response to query as to whether he knew why the agents were present.

As an additional cite, we direct the Court's attention to *U.S. v. Amato*, 495 F.2d 545, wherein it is noted that knowledge that a conspiracy exists is a minimum requirement for establishing requisite intent of the ac-

cused, and to establish the intent, evidence of knowledge must be clear.

We conclude our argument in this matter by citing the case of *Montoya v. U.S.*, 402 F.2d 582:

> "In order to sustain a conviction in circumstantial evidence cases, the inferences must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence."

We find it difficult to imagine or realize that an inference can be drawn that the vessel "The Last One" on which the Petitioners, LINARES and FERNANDEZ, were situated, was in the area for illegal purposes; and we must direct the Court's attention to the fact that there was found on the boat beer, a tackle box containing hooks, *lines* and sinkers, which are consistent with fishing.

The testimony of the confiscating officer was in total conflict in that in one instance he found lines, then he didn't find lines, then he did find lines. His credibility must be placed in question, particularly where he testified to the fact that it is not unusual for:

a. People to go line fishing.

b. People to buy bait at the point where they intend to fish.

c. And, testimony that Mr. Lorenzo Aday Lorenzo was a fisherman and that the parties were out fishing.

At the very best, this is an extraordinarily remote circumstantial evidence case. At its very worst, it shows and proves absolutely nothing.

For our final cite in this section, *Salinas* states:

> "Where all evidence is as consistent with innocence as with guilt, it is the duty of an appellate court to reverse a conviction of guilt against the accused."

We also direct the Court's attention to our statement which shows that the surveilling officers admitted there were other boats in the area, which must give rise to some doubt as to which, if any, boats had any relationship to that which took place on shore, assuming that anything at all took place, which is vague in nature.

We must conceivably direct the Court's attention to the factual situation in *U.S. v. Barrera*, 547 F.2d 1250 (1977). The facts in *Barrera* are that there appeared to be some remote connection between Leyva and the heroin which was evidenced to show that Leyva or his wife at one time owned a station wagon in which the heroin was concealed. In the case at bar, the showing by the Government is far less in that there is not even the slightest or remotest indication that the Petitioners had any knowledge of the existence of any marijuana.

If the Court were to state, as per the *Barrera* case, that it agrees with Petitioners that the evidence was insufficient to support the conviction, then we respectfully suggest to this Honorable Court that they have no other alternative but to reverse in the instant case.

We further cite to the Court, also in the case of *Barrera*:

> "Motion for acquittal must be granted when evidence, viewed in light most favorable to the government, is such that a reasonably minded jury must have a reasonable doubt as to the existence of essential elements of crime charged."

II

THE TRIAL COURT ERRED IN FAILING TO GRANT PETITIONERS' MOTION FOR DIRECTED VERDICT OF ACQUITTAL AT THE CLOSE OF THE CASE IN THE ABSENCE OF SUFFICIENT EVIDENCE OF POSSESSION WITH INTENT TO DISTRIBUTE.

The second question raised before the Court is the conviction of Petitioners who were charged with possession with intent to distribute. We find the conviction to be without any foundation whatsoever. A perusal of the facts indicate:

A. That there was no marijuana found on "The Last One".

B. That there was no residue of any marijuana found on "The Last One", in which the two Petitioners, together with one Lorenzo Aday Lorenzo, were on.

C. That there was no residue evidence or suspicion of marijuana or burlap fiber

from bags in which the alleged marijuana was wrapped, and which was allegedly found on shore in certain trucks which Petitioners had no contact with, control over, delivery for, or in any other way had relationship with.

Counsel recognizes the differences between actual and constructive possession of a controlled substance. However, nothing—but nothing—in the record, as closely as it may be read by anyone, will show any constructive or actual possession of a controlled substance, to wit: marijuana. There is nothing in the record which would give rise to a possibility that the Petitioners herein possessed, either constructively or actually, any substance which would evidence that they had any knowledge of, or knew about, any narcotic contraband allegedly brought into the United States.

We again deal with the question of inference upon inference, and upon a series of suppositions that do not constitute sufficient evidence for a Court to find the Petitioners guilty; and to do so would stretch the imagination from the world of reality into the world of make believe, fairyland, or any other imaginary supposition where everything may be possible, including the traversing of "Dorothy on the yellow brick road", or "Mr. Gene Kelley dancing with a mouse".

We apologize to the Court for any facetiousness, recognizing the severity of that which we argue; however, counsel must, in good faith and in good conscience, state that the remoteness of the Petitioners' position to that which was charged, to wit: possession with the intent to distribute, is so extreme that we must

go beyond the realm of reality to support the Government's argument of possession; constructive or otherwise.

We cite to the Court the case of *U.S. v. Martin,* 483 F.2d 974:

> "Such evidence, at most, may show appellant's knowledge of the sale of the illegal drug. It does not indicate that appellant took an active part in the sale, much less that she ever exercised any dominion or control over the drug. To establish constructive possession, however, there must be proof of dominion and control."
>
> *Garza v. U.S.,* 385 F.2d 899 (5 Cir. 1967)
> *Smith v. U.S.,* 385 F.2d 34 (5 Cir. 1967)
>
> "We think this case is squarely governed by the rule that 'mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding of possession' ".
>
> *U.S. v. Stephenson,* 474 F.2d 1353 (5 Cir. 1973)

In the *Martin* case there was again no evidence that the appellants actually possessed the mescaline. We must be redundant and state, in the same respect, that in this case there was no showing that the Petitioners actually possessed, constructively or otherwise, the marijuana.

We cite the above case, again, to illustrate to the Court that this judgment cites matters which were substantially more extreme than that which the Government attempted to prove in the instant case, and indicate again that the judgment of the jury and the Court in the instant case must be reversed.

Redundantly, but nevertheless consistently, we must hold, and we must direct the Court's attention to the fact that mere presence in an area where narcotics may have been involved when the Petitioners neither had possesson, maintained possession, or had constructive possession of the marijuana for which they were convicted, is insufficient to support a finding of possession.

Counsel feels rather reluctant to pursue and make a lengthy brief on matters which are so fundamental in law that a continual citation might be considered by this Honorable Court as an affront. We hope not, and it is the intention of this writer not to imply that this Court must be led or directed.

We, however, in support of our position, cite the case of *Judson Martin Smith, Jr., et al. v. U.S.,* 385 F.2d 34 (1967) which holds that "mere presence in an area of narcotics or awareness of its location is not sufficient to establish possession thereof."

Glasser v. U.S., 315 U.S. 60, 86 L.Ed. 68 (1942) states:

> "All matters must be viewed in light most favorable to the government."

We take no exception to that rule. What we take exception to, however, is the fact that all things being as they are, the Government failed in all counts to establish the guilt of Petitioners beyond and to the exclusion of every reasonable doubt, and that a conviction be supported by underlying substantial evidence. The *Glasser* case is probably a classic case in circumstantial evidence, but of such an obtruse nature that the lower Court, and of course this Court, must find that the evidence was not consistent with guilt, but consistent with every reasonable hypothesis of innocence. *U.S. v. Ferg,* 504 F.2d 914 (1974).

The Petitioners, joined by the other defendants in this case, moved for judgment of acquittal on the issues of sufficiency, and we contend that the United States District Court, Southern District of Florida, should have, and was under an obligation to have dismissed or discharged the Petitioners herein; it being understood that these Petitioners, LINARES and FERNANDEZ, were "wrapped into" a trial with at least two defendants who allegedly did enter into some agreement to perform some act with Mr. Berckmans, the act being to import lobsters, frozen lobster tails and coffee, not narcotics. We emphasize this, not that it affects Petitioners herein, but in all fairness to the other defendants who may be taking an appeal. We, therefore, strongly suggest that the verdict against the Petitioners, LINARES and FERNANDEZ, be reversed and this Court enter any other appropriate orders.

III

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE A TACKLE BOX FOUND ON "THE LAST ONE" WHERE THE CHAIN OF CUSTODY WAS DEFECTIVE AND THERE WAS EVIDENCE OF DELIBERATE TAMPERING WITH THE PROPERTY FOUND ON "THE LAST ONE".

Petitioners do not contest the general proposition of law that where the record fails to reveal evidence by live witnesses as to who had in their possession or control evidence, involved from the time of its seizure until the introduction into evidence, that the test is whether or not there is an indication of probable tampering. *Gallego v. U.S.*, 276 F.2d 914 (9 Cir. 1960); *State v. Anderson*, 242 or 368, 409 P.2d 681. In fact, the question involved in this matter is where the record is highly suggestive of actual tampering with evidence, whether or not same could have been admitted into evidence or whether the tampering with evidence was of such a magnitude that a mistrial should have been declared and a new trial given the Petitioners.

The test in Florida, as well as in the Federal system, has always been whether or not there was an indication of probable tampering with evidence. *Bernard v. State*, 275 So.2d 35 (Fla. 3 DCA 1973). Clear cut evidence of tampering has never been required, merely an indication from the record that same has occurred.

It is important to note at this point that what is being raised in this appeal is not a normal "chain of

custody" argument. Under the dictates of the Fifth Circuit, in *U.S. v. Ellis*, 547 F.2d 863 (5 Cir. 1977) and *U.S. v. McDowell*, 539 F.2d 435 (5 Cir. 1976), chain of custody normally goes to the weight and not the admissability of the evidence and should be left to the consideration of the jury. This is even the case in those situations where the chain of custody did not establish storage of contraband independently but with other drugs of similar nature.

However, Petitioners, LINARES and FERNANDEZ, would assert that the dictates of *U.S. v. Dougherty*, 505 F.2d 1019 (5 Cir. 1974) are still controlling with regard to the admissability of evidence. In the *Dougherty* case, it was held that the admission of powder which defendant sold to an officer and .7% of which was found to be heroin, was within the trial court's discretion, notwithstanding the contention that the small amount of heroin found in the powder had been added by someone with access to the evidence at some point in the chain of custody. The Court held that absent showing of ill will, bad faith, or other evil motivation *or some physical evidence of tampering,* even though such opportunity existed, would not render inadmissable the evidence.

In the instant case, we have the physical evidence of tampering which is necessary to exclude the evidence introduced by the Government. A clear reading of the Statement of Facts indicates that the Petitioners were bringing forth for jury consideration a defense predicated on the nature of the vessels being fishing vessels, the nature of the individuals found on the vessels being fishermen. Clearly, it became of importance as to whether or not fishing could have been attempted by the vessels on the night in question. Through the testimony of the Government witnesses, a question did arise as to whether or not fishing line was present upon the vessel, "The Last One". Petitioners were aboard the vessel, "The Last One", and are directly affected by that area relating to their defense. The tackle box was admitted into evidence despite the fact that the normal links in the "chain of custody" were not built as solidly as those dealing with contraband itself. To this point alone, we do not raise a great objection. In fact, were that the only fact that there were defects in the chain proven, Petitioners would agree that our objection would have gone to weight rather than to admissability. The additional factor found, however, was that at the time of the inventory on board there was an indication that some line was found. (R 513-514) There was further indication that at the time of the seizure on board there were several cans of an alcoholic beverage. (R 513-514) It is also clear that when the vessel was turned over to Customs the alcoholic beverage (the presence of which is uncontroverted) and the line (the presence of which there may be some doubt) were no longer present, and the items found in the tackle box were just those items found by the customs official. There is no question that there is absolute physical evidence of tampering. While the Petitioners do not ascribe evil motive to either the boarding party or to the customs officials, it is clear to see that under the circumstances, either of the parties may not have felt that either the alcoholic beverage or the fishing line were material to the issues of the case, neither were clearly contraband, and someone may have just walked off with same. As this is the most reasonable explanation of why these items were missing, it was clearly error to admit the tackle box into evidence where there was such

evidence of physical tampering. The introduction of same to establish that there was no fishing gear on board was clearly erroneous and highly prejudicial to the Petitioners, LINARES and FERNANDEZ. Therefore, Petitioners would pray that on this point alone, the determination of the lower court be reversed with directions to remand this case for a new trial with instructions not to admit the tackle box into evidence.

IV

THE TRIAL COURT ERRED IN DENYING DEFENDANTS' MOTION FOR THE DIVULGENCE OF A CONFIDENTIAL INFORMANT WHERE NO CLAIM OF PRIVILEGE HAD BEEN MADE BY THE UNITED STATES, NOR ANY REPRESENTATION THAT DISCLOSURE OF THE CONFIDENTIAL INFORMANT WOULD ENDANGER THE GOVERNMENT'S INTEREST.

In the case instanter, the Petitioners, by motion, prior to and at trial, sought the identity of an undisclosed Governmental confidential informant. Testimony was adduced at the hearing prior to trial (and referenced during argument at trial) and at trial, that the Government had a confidential informant which had, in fact, procured the illegal act that the Petitioners were accused of. The testimony at trial indicated that a confidential informant had participated in the creation of the original agreement between the parties to bring in contraband to the United States, and had been one of the operating or motivating forces in procuring the ultimate acts which Petitioners were accused of. The identity, therefore, of the confidential informant became essential to the Petitioners' position relating to the knowledge of the Petitioners as to the quality and result of their ultimate acts. Clearly, this had definite effect upon Petitioners' rights under their Sixth Amendment right of confrontation. It is a general rule that the Government is privileged to withhold from disclosure the identities of persons who furnish information relating to violations of law to officers charged with enforcing those laws. *Jencks v. U.S.*, 353 US 657, 1 L.Ed.2d 1103, 77 S.Ct. 1007 (1957). See also *Portomene v. U.S.*, 221 F.2d 582 (5 Cir. 1955).

It is equally true that there is no exact rule with respect to the disclosure of the identity of the informer, and the requirement which is created is a balancing of public policy as opposed to a defendant's right to properly prepare his defense. Most importantly, it has been held that whether a proper balance renders non-disclosure erroneous, depends upon the circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. *Roviaro v. U.S.*, 353 US 53, 1 L.Ed.2d 639, 77 S.Ct. 623 (1957).

In recognizing this balancing test, the most important consideration arises from what is felt to be the fundamental requirements of fairness. In other words, if an informer's identity is relevant and would be helpful to the defense of an accused, or would be construed to be essential to a fair determination of the case, the privilege of non-disclosure must give way. *Portomene v. U.S.*, supra; *Cannon v. U.S.*, 158 F.2d 952 (5 Cir. 1946).

Perhaps the leading case dealing with the question of disclosure of the identity of a confidential informant is *Roviaro v. U.S.*, supra. In that case, the U.S. Supreme Court ruled that the District Court, by allowing the Government to withhold the identity of its informer, committed reversible error where the informer, an undercover Government employee, had taken a material part in bringing about the defendant's possession of heroin, which was the basis of an indictment charging the defendant with a violation of the narcotic drugs import and export act.

It was the position of the Petitioners at the case at bar that the undercover informant, whose name was not even given, had participated in the initial negotiations which set up the basis or scheme which was to evolve into the conspiracy and had, in fact, direct knowledge as to what the ultimate participation of the Petitioners would become.

Further, in *Roviaro,* it was indicated that the disclosure of the confidential informant would be proper in the event that he might be a material witness as to whether or not the defendant knowingly transported the drugs as charged. Although *Roviaro* differs from our case in that the undercover informant was the only participant other than the defendant, the Court specifically stated:

(353 U.S. 60)

"The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the con-

tents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In those situations, the trial court may require disclosure and if the government withholds the information, dismiss the action."

The Court then went on specifically to say:

"Most of the Federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claim to establish probable cause. In these cases, the government has been required to disclose the identity of the informant, unless there was sufficient evidence apart from his confidential communication." (Emphasis ours)

In the case at bar, the specific requirement of *Roviaro* with regard to this question is evident. In the instant case, the privilege has been upheld where the legality of a search without a warrant was in fact at issue; and further, that the communication of the in-

former did, in fact, establish the probable cause for Government agents to even be in the area at the time. The record is clear that all other communications other than those with the initial confidential informant indicated that the nature of the contraband to be brought into the Turkey Point area was "lobster tails and/or coffee". The Court went on in *Roviaro* in reversing and stating as follows:

> "DOE, (Undercover Informant) had helped set up the criminal occurrence and had played a prominent part in it. His testimony may have disclosed an entrapment. He may have thrown doubt upon petitioner's identity or the identity of the package. He was the only witness who might have to the petitioner's possible lack of knowledge of the contents of the package that he transferred from the tree to John Doe's car. With the desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the government to decide." (353 US 64)

Petitioners' rights to the divulgement of the confidential informant is further substantiated by the holding of the U.S. Supreme Court in *Sherman v. U.S.*, 356 U.S. 269, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958) wherein the Court said that to determine whether the defense of entrapment has been established, a line must be drawn between the trap for an unwary innocent and the trap for an unwary criminal; to make this determination, the accused at trial should be allowed to examine the conduct of the government agent or informant involved and avail himself of an appropriate and searching inquiry

into the conduct of all parties, including himself, his predisposition, and how same relates to his claim of innocence. The Government, by denying Petitioners in the case at bar the right to the identity of the informer, in effect, deprived the Petitioners of either a viable determination on their ultimate motion, or would have deprived them of a fair trial. As such, the decision of the trial court as to the question of the divulgence of the confidential informant should be reversed and remanded with instructions to divulge the identity as same would be consistent with the holding of the U.S. Supreme Court in the *Roviaro* decision.

V

THE TRIAL COURT ERRED IN MAKING PREJUDICIAL COMMENTS IN ITS LIMITING INSTRUCTION WHICH EFFECTIVELY DENIED PETITIONERS A FAIR TRIAL.

As reflected in the Court's opinion of January 26, 1979:

> (12) Early in the direct examination of Berckmans he was asked about conversations between him and Abascal. Defendants asked for an instruction limiting to Abascal the effect of statements made by him. The Court gave this instruction:
>
> "Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that a defendant was one of the members, then the statement thereafter knowingly made and the act or acts knowingly

done by any person likewise found to be a member may be considered by the jury as evidence in this case as to the other defendants found to have been a member, even though the statement and act may have occurred in the absence and without the knowledge of the defendant provided that such statement and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of the court by one person may not be considered as evidence against any person who was not present and did not hear the statement made nor see the act done.

Therefore, the statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination, may be considered as evidence only against the person making that statement.

I repeat that the Government will have to show to the Court and to the jury that there has been by independent evidence, not of a hearsay nature, evidence sufficient to establish the particular defendant's connection with the conspiracy, *and that determination will be made by the Court*.

Now, I also remind you that this testimony if used, only applies to Count I of the indictment

and does not apply to the substantive count which is the count that charges possession with the intent to distribute and does not charge a conspiracy."

It is generally accepted that, "There is no question that a witness can testify to declarations made to him by a co-conspirator, only if the Government by independent evidence establishes a prima facie case of the existence of a conspiracy and introduces at least 'slight evidence' to connect with the conspiracy both the declarant and the defendant against whom the statement is introduced." *United States v. Archbold-Newball*, 554 F.2d 665 (5 Cir. 1977) See all *United States v. Nixon*, 418 U.S. 683 (1974); footnote 16; *United States v. Oliva*, 497 F.2d 130 (5 Cir. 1974); *United States v. Tyler*, 505 F.2d 1329 (5 Cir. 1974). Thus, the test for introducing co-conspirator's statements is proof by the government by independent evidence of the existence of a prima facie case of "slight evidence."

The trial judge in the case at bar, however, instructed the jury that the test was, "whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed . . ." By instructing the jury that the Court would make the determination of whether or not there existed a conspiracy for the purpose of introducing evidence of co-conspirators, and by further instructing the jury that the test for making that determination is beyond a reasonable doubt, the jury was in effect told that the standard for the introduction of this evidence is the same standard as for conviction, to wit: beyond a reasonable doubt, and that the Court would make this determination.

As read and objected to, the judge's instructions to the jury made it clear that the judge's allowing in co-conspirator's statements indicated a determination by the judge that evidence beyond a reasonable doubt had been established as to the conspiracy. As such, the jury could also determine that evidence beyond a reasonable doubt of the conspiracy existed for the purpose of conviction. If in fact the judge had properly instructed the jury as to the burden of proof prior to the introduction of a co-conspirator's statement as being the establishment of a prima facie case, no conflict would have been established in the jury's mind as to their legal responsibilities and duties.

Furthermore, the Fifth Circuit, in affirming, relied upon the fact that, "at least three times later during the testimony the Court gave the limiting instruction free of the phrase objected to, and without objection, gave a similar instruction in the charge to the jury." However, as held in the case cited by the State in its brief, *U.S. v. Appollo*, 476 F.2d 156 (5 Cir. 1973):

> "The government calls our attention to the charge given by the court at the conclusion of the trial. While it does contain an accurate statement of the rule of hearsay evidence in conspiracy cases it came too late. This delicately dangerous defusing must be firmly in the jury's mind when the hearsay is proffered. An instruction at the end of the trial cannot correct the erroneous refusal to give the proper cautionary instruction when it was first requested."

Thus, the later proper instructions cannot eliminate the error and prejudice caused by the trial judge in improperly instructing the jury as to the appropriate burden of proof for the introduction of co-conspirator's statements and the respective responsibilities of the Court and the jury.

CONCLUSION

For the above reasons and the authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its Order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was this day of , 1979, furnished by U.S. Mail to the Office of the Solicitor General, Department of Justice, Washington, D.C. and to the Office of the U.S. Attorney, 300 Ainsley Building, 14 NE First Avenue, Miami, FL 33132.

Respectfully submitted,

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Appendix

UNITED STATES of America,
Plaintiff-Appellee,

v.

Pedro Luis MORENO, Felix Gonzalez Valdez, Sebastian Viera, Jose Luis Linares, Lorenzo Aday-Lorenzo and Mario Abascal, Jose A. Fernandez, Defendants-Appellants.

No. 77-5712.

United States Court of Appeals,
Fifth Circuit.

Jan. 26, 1979.

In a marijuana smuggling case, all defendants were convicted in the United States District Court for the Southern District of Florida at Miami, Sidney M. Aronovitz, J., of conspiracy, and of possession. Defendants appealed. The Court of Appeals, Godbold, Circuit Judge, held that: (1) evidence was sufficient to sustain the convictions; (2) there was adequate evidence of probable cause and exigent circumstances to justify warrantless search and seizure; (3) the mere possibility of obtaining relevant testimony was too remote to require disclosure of an informant, and (4) in view of the fact that a limiting instruction free of a phrase objected to was given three times without objection during testimony and that a similar instruction was also given

in the charge to the jury, and in view of other circumstances, the ambiguous phrase, "and that determination will be made by the court," used in reference to sufficiency of evidence to establish a particular defendant's connection with the conspiracy, was not reversible error.

Convictions affirmed.

1. Conspiracy — 47(12)

Contention that evidence was insufficient to sustain conviction for conspiracy in marijuana smuggling case was almost frivolous as to contact man, in view of, inter alia, his payment of bribes, his promise of new cars for all participants, and his boasting of national and international size and scope of his organization, and evidence was sufficient to sustain also conviction of other defendants for conspiracy.

2. Criminal Law — 1177

As to defendants who received concurrent sentences for marijuana possession and for conspiracy, it was not necessary to review sufficiency of evidence under possession count in view of sufficiency of evidence to permit the convictions for conspiracy.

3. Criminal Law — 59(1)

Conspirator can be found guilty of substantive offense based upon acts of co-conspirator done in furtherance of conspiracy unless act did not fall within scope of the unlawful project or was merely part of ramifications of plan which could not be reasonably

foreseen as necessary or natural consequence of the unlawful agreement.

4. Drugs and Narcotics — 124

In view of finding of conspiracy, and attributing acts of other defendants to defendant in question, who was planner and expediter of beachhead end and active participant at landing, evidence was sufficient to sustain conviction on count of possession in marijuana smuggling case.

5. Criminal Law — 394.4(12)

In view of adequate evidence of probable cause and exigent circumstances, suppression of marijuana found on vessel was properly refused, and same was true as to marijuana found in blue truck/camper and van. U.S.C.A.Const. Amend. 4.

6. Arrest — 63.5(6)

In view of evidence providing sufficient basis from which to infer that person driving van when stop was made, whoever he was, was participating in marijuana conspiracy, and in view of operation of van in unusual manner, there was probable cause to stop and remove vehicle; officers needed only probable cause to suspect criminal activity, and driver's participation in it, and not proof certain. U.S.C.A.Const. Amend. 4.

7. Arrest — 63.4(16)

For purposes of probable cause to arrest, officers, who had probable cause to stop and remove van, were

not required to exclude possibility that driver had no knowledge of contents of cargo compartment.

8. Drugs and Narcotic — 183

Where, after van which had been stopped on probable cause was driven to police headquarters and officer found that side door was unlocked, and he opened door and found bales of marijuana inside, entry was proper. U.S.C.A.Const. Amend. 4.

9. Arrest — 63.5(6)

Evidence established probable cause on part of officers to stop truck/camper which, on search, was found to contain marijuana. U.S.C.A.Const. Amend. 4.

10. Witnesses — 216

Absent any contention that informer participated to any extent in criminal activity, but, rather, in initial stages of venture he dealt with unindicted conspirators before they first approached witness, disclosure of confidential informant, sought during testimony of such witness, was properly refused.

11. Witnesses — 216

Mere possibility of obtaining relevant testimony was too remote to require disclosure of informant in marijuana smuggling prosecution, something more than speculation about possible usefulness of an informant's testimony being required.

12. Criminal Law — 822(2)

In view of fact that limiting instruction free of phrase objected to was given three times without objection during testimony and that similar instruction was also given in charge to jury, and in view of other circumstances, ambiguous phrase, "and that determination will be made by the court," used in reference to sufficiency of evidence to establish particular defendant's connection with conspiracy, was not reversible error, despite contention that statements made by co-defendant were not properly limited to such codefendant.

Appeals from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, GODBOLD and FAY, Circuit Judges.

GODBOLD, Circuit Judge:

This is a marijuana smuggling case. All the appellants were convicted under Count I of conspiracy to possess marijuana with intent to distribute, and under Count II of possession of marijuana with intent to distribute. The convictions are affirmed.

There was ample evidence to permit the jury to find the following facts. Berckmans was an officer of a firm supplying security services for Turkey Point Nuclear Power Plant, a large installation on Biscayne Bay and near Miami, Florida. Berckmans was asked to arrange to plant an outsider in the security force at Turkey Point

who would cooperate in the landing of a shipment of contraband described to him as lobster tails and coffee.

The initial approach to Berckmans was made by Navarro and Medina, unindicted co-conspirators. Berckmans began to cooperate with DEA agents. A few days later he was approached by Abascal, who gave him a bribe and discussed the proposed landing operation. Foley, an undercover agent, was planted as the guard. When word was passed that the shipment was arriving, the Turkey Point area was put under surveillance by numerous agents posted on land and water. They were briefed on the operation beforehand. Foley came to the scene at night, met Abascal, and opened a locked gate to admit a white van with "JG Nursery" signs on it. Soon thereafter, when Foley resumed his rounds as guard, he saw on a road near Turkey Point a blue truck with a white camper body on it sitting beside the road with its lights out and occupied by appellant Valdez. Also, about a mile further along on the same road, he saw another camper, green in color.

Surveilling agents saw two boats enter a canal in the Turkey Point area. The boats passed from view, and no one saw any actual unloading. Later *The Last One*, which was the smaller vessel, came out of the canal, went back in, then re-emerged towing the *Andrea*, the larger boat, which had lost power. The boats were stopped and those aboard arrested. Minimal amounts of marijuana were found on the *Andrea*.

Later, on the same night and within a few miles of Turkey Point, the blue truck/camper and the JG Nursery van were stopped and found to contain marijuana.

The defendants fall into several groups: (1) Abascal, the contact man; (2) those aboard the larger boat, the *Andrea*; (3) those aboard the smaller boat, *The Last One*; and (4) the two men driving the van and the truck/camper.

I. Sufficiency of the evidence.

[1] All defendants argue that the evidence was insufficient.[1] We consider this first with respect to the conspiracy count. This contention by Abascal, the contact man, is almost frivolous. He paid bribes to Berckmans and Foley, promised new cars for all participants, and boasted of the national and international size and scope of his organization. He took Berckmans and Foley to the site to show them where the contraband was to be landed and told them the site had been used three or four times previously. He explained how the cargo boat would be guided in. On the night of the landing he met Foley at the locked gate and participated in admitting the JG Nursery van. Abascal insists that there was insufficient evidence to support an inference that he had actual knowledge that the cargo was marijuana, emphasizing his numerous references to lobster tails and coffee. The jury was, of course, entitled to infer from the evidence which we have set out, especially the elaborate and costly arrangements for the specific shipment, the mention of previous shipments, and the description of the organization involved, that Abascal knew what the contraband was. Berckmans was not so naive as to take the lobster and coffee talk at face value, the jury was not required to be that naive, nor are we.

[1] All properly moved for judgments of acquittal.

The defendants attach significance to the lack of direct evidence that the marijuana in the van and the blue truck/camper came from either or both of the boats. There were other boats in the same area of Biscayne Bay, but there was no testimony that other boats entered the canal. No one actually saw marijuana offloaded from either boat or loaded into vehicles or even observed the boats and the vehicles at the same site. Nevertheless the circumstantial evidence is so strong that lack of observation at canalside makes little difference. As the operation developed it was consistent with Abascal's advance arrangements, and no one saw or even suggests the presence of lobster tails and coffee. Boats, trucks and people assembled at the remote designated place, on the seacoast, at nighttime. The van was summoned, the jury could find, by Abascal's walkie-talkie. It and the two campers took up positions on the only road that led along the canal up which the boats were seen by surveilling agents to disappear. The boats appeared on the bay, flashing lights on and off, briefly entered one canal and then entered and disappeared up a second canal. Engine noises were heard from sources other than the boats, and voices. The jury could infer these came from the vehicles that had been waiting inside the gate. These sounds stopped when the boat engines stopped. Engine noises resumed, and soon *The Last One* emerged, reentered the canal and remerged towing the Andrea. The blue truck/camper and the van were seen to depart and were soon stopped, loaded with marijuana. Marijuana was found in the larger boat. All of this adequately supports inferences that the source of the marijuana in the blue truck/camper and van was one or both boats.

Viera and Aspuru were on the *Andrea*. A small quantity of marijuana was found on board. Clearly the evidence was sufficient as to them. Though no marijuana was found on *The Last One*, the evidence was sufficient as to those on it, Linares, Fernandez, and Aday-Lorenzo. Its activities, Abascal's statements describing the arrangement for a navigator (or, inferentially, a lead boat) to guide the cargo boat in, the movements of the two boats into and out of one canal and then into the second canal, the temporary departure of *The Last One* and its reentry and return towing the *Andrea* — these adequately support jury submission on the conspiracy count with respect to those aboard *The Last One*.

[2-4] We are required to review the sufficiency of evidence under the possession count with respect to only Abascal because all other defendants received concurrent sentences.[2] There was no evidence that Abascal was ever in actual possession of any of the marijuana. Possibly his role as the person in charge of arrangements for the landing, his presence at the scene, and his activities at the time, were sufficient to support submission to the jury of constructive possession. But we do not need to rest on this basis. In *Pinkerton v. U.S.*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946), the Supreme Court set out the principle of vicarious liability in conspiracy cases. A conspirator can be found guilty of a substantive offense based upon acts of a co-conspirator done in furtherance of the conspiracy, unless the act "did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or

[2]Although some of what we have to say relates to the other defendants as well.

natural consequence of the unlawful agreement." *Id.* at 647-48, 66 S.Ct. at 1184, 90 L.Ed. at 1497. Several of our judges have noted their concern that vicarious guilt may have due process limitations, *Park v. Huff,* 506 F.2d 849, 864 (CA5, 1975) (en banc) (Thornberry, J., dissenting). This concern need not trouble us here with respect to Abascal. The jury could infer actual possession by the defendants aboard the *Andrea* and the defendants who hauled marijuana away in the van and the blue truck/camper. Attributing the acts of these defendants to Abascal, the planner and expediter of the beachhead end and an active participant at the landing, is not so attenuated as to give us due process concerns.

II. Validity of searches and arrests.

[5] There was no error in refusing to suppress the marijuana found on the *Andrea.* There was adequate evidence of probable cause and the circumstances were exigent.

[6, 7] Nor was there error in refusing to suppress the marijuana found in the blue truck/camper and the van. After Foley admitted the van through the gate and observed the two campers he radioed to other agents in the vicinity a description of the vehicles. Later he saw the two campers and the van within the Turkey Point area, that is, inside the entry gate through which he had let the van enter. Still later he saw the blue truck/camper and the van leave the Turkey Point area and proceed north on Tallahassee Road with their lights out. He radioed this information.

Defendant Moreno was driving the JG Nursery van when it was stopped. An agent coming south spotted it

moving north on Tallahassee Road. The van pulled off the road and turned off its lights. The agent made a U-turn and found the van had resumed moving north and with its lights still off. He and a back-up unit stopped the van and arrested driver Moreno. The rear door was padlocked and Moreno had no key to it. Moreno concedes that it was lawful to make an investigatory stop of the van but asserts there was not probable cause to arrest him. The van was tied to the Turkey Point activities by the circumstances we have described, and soon after it left Turkey Point and after being observed to operate in an unusual manner, was stopped. While Moreno had not been identified as present at Turkey Point, there was sufficient basis to infer that the person driving the van when the stop was made, whoever he was, was participating in a marijuana conspiracy. The officers only needed probable cause to suspect there was criminal activity afoot and that Moreno was participating in it, not proof certain of it. For purposes of probable cause to arrest, the officers were not required to exclude the possibility that Moreno had no knowledge of the contents of the cargo compartment. A second argument, that officers had insufficent basis to suspect there was marijuana in the van, is disposed of by what we have said concerning sufficiency of the evidence.

[8] The officers did not search the van at the scene because the rear door opening into the cargo area was locked. After the van was driven to police headquarters an officer found that a side door was unlocked. He opened the door and found bales of marijuana inside. The entry was proper under *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

[9] A surveilling agent saw the blue truck/camper going north on Tallahassee Road. He followed it while verifying the license number with Foley by radio. Officers in a marked car assisted in making a stop and an arrest. Valdez was asked to open the cargo compartment, he did so, and there were bales of marijuana inside. The officers had probable cause to stop and arrest. What we have just said concerning Moreno applies to Valdez as well. Also Valdez had been identified by Foley as the driver of the blue truck/camper when Foley first saw it near Turkey Point. Possibly Valdez consented to the search of the van but, in any event, there was probable cause to search and exigent circumstances.

III. Disclosure of informer.

[10, 11] During the testimony of Berckmans defense counsel moved for the disclosure of a confidential informant who had met with persons involved in the conspiracy before Abascal contacted Berckmans and began the series of events described above. After oral argument the court denied the motion. This was not error. There was no contention that the informer participated to any extent in the events we have described. Rather, in the initial stages of the venture, he dealt with the unindicted conspirators, Navarro and Medina, before they first approached Berckmans. This court has held that where the informant was not an active participant in the criminal activity, but only a tipster, disclosure of his identity is not required by *Roviaro v. U.S.*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). *Suarez v. U.S.*, 582 F.2d 1007, 1011 (CA5, 1978); *U.S. v. Alonzo*, 571 F.2d 1384, 1387 (CA5, 1978). There is no contention that any of the defendants, or Berckmans or Foley, ever met or talked with this informer. Defendants asserted a

right to know his identity on the basis that his early conversations with Navarro and Medina might shed light on their theory that they had no knowledge marijuana was involved in the shipment. This possibility of obtaining relevant testimony is too remote to require disclosure. *See Suarez v. U.S., supra* at 1012; *U.S. v. Morris*, 568 F.2d 396, 400 (CA5, 1978). Something more than speculation about the possible usefulness of an informant's testimony is required. *U.S. v. Hansen*, 569 F.2d 406, 411 (CA5, 1978).

IV. Admission of evidence.

The admission into evidence of a tackle box found aboard *The Last One* was within the discretion of the trial court.

V. The limiting instruction concerning hearsay.

[12] Early in the direct examination of Berckmans he was asked about conversations between him and Abascal. Defendants asked for an instruction limiting to Abascal the effect of statements made by him. The court gave this instruction:

> Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed, and that a defendant was one of the members, then the statement thereafter knowingly made and the act or acts knowingly done by any person likewise found to be a member may be considered by the jury as evidence in this case as to the other defendants found to have been a member, even though the statement and act may have occurred in the

absence and without the knowledge of the defendant, provided that such statement and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of the court by one person may not be considered as evidence against any person who was not present and did not hear the statement made nor see the act done.

Therefore, the statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination, may be considered as evidence only against the person making that statement.

I repeat that the Government will have to show to the Court and to the jury that there has been by independent evidence, not of a hearsay nature, evidence sufficient to establish the particular defendant's connection with the conspiracy, and that determination will be made by the Court.

Now, I also remind you that this testimony if used, only applies to Count I of the indictment and does not apply to the substantive count which is the count that charges possession with the intent to distribute and does not charge a conspiracy.

Defendants objected to the underlined language on the ground that it would lead the jury to believe that a ruling by the court that the evidence was sufficient to tie a defendant into the conspiracy would be a direction to them that as a matter of law the particular defendant was a member of the conspiracy. The phrase was ambiguous. But at least three times later during the testimony the court gave the limiting instruction free of the phrase objected to, and without objection, and gave a similar instruction in the charge to the jury. Also, Abascal's statements implicated by name no other persons charged as conspirators but only by descriptive terms such as "truck drivers" and "navigator." In these circumstances the ambiguous phrase, used once in this lengthy trial, was not reversible error.

The convictions are AFFIRMED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CASE NO. 77-5712

LORENZO ADAY-LORENZO,
JOSE ASPURU, and
SEBASTIAN VIERA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

MOTION FOR REHEARING

COME NOW the Defendants, LORENZO ADAY-LORENZO, JOSE ASPURU, and SEBASTIAN VIERA, by and through their undersigned counsel, and file this, their Petition for Rehearing, and would allege in furtherance thereof as follows:

1. As reflected in this Court's opinion of January 26, 1979:

(12) Early in the direct examination of Berckmans he was asked about conversations between him and Abascal. Defendants asked for an instruction limiting to Abascal the effect of statements made by him. The court gave this instruction:

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that a defendant was one of the members, then the statement thereafter knowingly made and the act or acts knowingly done by any person likewise found to be a member may be considered by the jury as evidence in this case as to the other defendants found to have been a member, even though the statement and act may have occurred in the absence and without the knowledge of the defendant provided that such statement and acts were knowingly made and done during the continuance of such conspiracy and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory statement made or act done outside of the court by one person may not be considered as evidence against any person who was not present and did not hear the statement made nor see the act done.

Therefore, the statements of any conspirator which are not in furtherance of the conspiracy or made before its existence or after its termination, may be considered as evidence only against the person making that statement.

I repeat that the Government will have to show to the Court and to the jury that there has been by independent evidence, not of a hearsay nature, evidence sufficient to establish the particular defendant's connection with the con-

spiracy, *and that determination will be made by the Court.*

Now, I also remind you that this testimony if used, only applies to Count I of the indictment and does not apply to the substantive count which is the count that charges possession with the intent to distribute and does not charge a conspiracy."

2. It is generally accepted that, "There is no question that a witness can testify to declarations made to him by a co-conspirator, only if the Government by independent evidence establishes a prima facie case of the existence of a conspiracy and introduces at least 'slight evidence' to connect with the conspiracy both the declarant and the defendant against whom the statement is introduced." *United States v. Archbold-Newball,* 554, F.2d 665 (5th Cir., 1977). See also *United States of America v. Nixon,* 418 U.S. 683 (1974) footnote 16; *United States of America v. Oliva,* 497 F.2d 130 (5th Cir., 1974); *United States of America v. Tyler,* 505 F.2d 1329 (5th Cir., 1974).

3. Thus, the test for introducing co-conspirator's statements is proof by the government by independent evidence of the existence of a prima facie case or "slight evidence".

4. The trial judge in the case at bar, however, instructed the jury that the test was, "whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed . . ."

5. By instructing the jury that the court would make the determination of whether or not there existed a conspiracy for the purpose of introducing evidence of co-conspirators, and by further instructing the jury that the test for making that determination is beyond a reasonable doubt, the jury was in effect told that the standard for the introduction of this evidence is the same standard as for conviction, to wit: beyond a reasonable doubt, and that the court would make this determination.

6. As read and objected to the judge's instructions to the jury made it clear that the judge's allowing in co-conspirator's statements indicated a determination to the judge that evidence beyond a reasonable doubt had been established as to the conspiracy. As such, the jury could also determine that evidence beyond a reasonable doubt of the conspiracy existed for the purpose of conviction.

7. If in fact the Judge had properly instructed the jury as to the burden of proof prior to the introduction of a co-conspirator's statement as being the establishment of a prima facie case, no conflict would have been established in the jury's mind as to their legal responsibilities and duties.

8. Furthermore, this Court in affirming relied upon the fact that, "at least three times later during the testimony the Court gave the limiting instruction free of the phrase objected to, and without objection, gave a similar instruction in the charge to the jury."

9. However, as held in the case cited by the State in it's brief, *United States v. Appollo,* 476 F.2d 156 (5th Cir. 1973);

"The government calls our attention to the charge given by the court at the conclusion of the trial. While it does contain an accurate statement of the rule of hearsay evidence in conspiracy cases it came too late. This delicately dangerous defusing must be firmly in the jury's mind when the hearsay is proffered. An instruction at the end of the trial cannot correct the erroneous refusal to give the proper cautionary instruction when it was first requested."

10. Thus, the later proper instructions cannot eliminate the error and prejudice caused by the trial judge in improperly instructing the jury as to the appropriate burden of proof for the introduction of co-conspirator's statements and the respective responsibilities of the court and the jury.

WHEREFORE, Defendants respectfully request this Honorable Court to take under consideration the arguments presented herein and to grant rehearing in this matter.

I HEREBY CERTIFY that a (illegible) copy of the foregoing Motion was furnished by U.S. mail to the (illegible) of THE U.S. ATTORNEY, 300 Ainsley Building, Miami, Florida (illegible) 6th day of Feb., 1979.

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CASE NO: 77-5712

JOSE LUIS LINARES and
JOSE A. FERNANDEZ,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

MOTION FOR REHEARING

COME NOW the Appellants, JOSE LUIS LINARES AND JOSE A. FERNANDEZ, and move this Honorable Court to adopt as argument hereon, the Motion for Rehearing previously filed on behalf of Co-Appellants LORENZO-ADAY-LORENZO, JOSE ASPURU and SEBASTIAN VIERA.

Telegraphic notification was sent this date in order not to prejudice Appellants due to the illness of their counsel.

I HEREBY CERTIFY that a true copy of the foregoing Motion for Rehearing was furnished by US. mail to the OFFICE OF THE U.S. ATTORNEY, 300 Ainsley Building, Miami, Florida this 13th day of February, 1979.

SEYMOUR LONDON, ESQ.
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FILED MAR 2 1979

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5712

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PEDRO LUIS MORENO, FELIX GONZALEZ VALDEZ, SEBASTIAN VIERA, JOSE LUIS LINARES, LORENZO ADAY-LORENZO, MARIO ABASCAL, JOSE A. FERNANDEZ, and JOSE ASPURU.
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

ORDER:

IT IS ORDERED that the request of Appellants, Jose Luis Linares and Jose Fernandez, to adopt the petition for rehearing previously filed on behalf of Appellants, Lorenzo Aday-Lorenzo, Jose Aspuru, and Sebastian Viera, is GRANTED

/s/ John Godbold
UNITED STATES CIRCUIT JUDGE

FILED MAR 2 1979

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5712

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PEDRO LUIS MORENO, FELIX GONZALES VALDEZ, SABASTIAN VIERA, JOSE LUIS LINARES, LORENZO ADAY-LORENZO, MARIO ABASCAL, JOSE A FERNANDEZ and JOSE ASPURU,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

ON PETITIONS FOR REHEARING

(March 2, 1979)

Before BROWN, Chief Judge, GODBOLD and FAY, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed on behalf of appellants Moreno, Viera, Aday-Lorenzo and Aspuru in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/s/ JOHN C. GODBOLD
United States Circuit Judge